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EU report finds zero-rating doesn't clash with competition laws

Technology and Innovation, Telecommunications

Last week, the European Union Directorate-General for Competition released a report on the effects of zero-rating practices on competition in broadband markets, commissioned from consultants DotEcon, Aetha, and Oswald & Vahida. The report reviewed both the theoretical arguments regarding zero-rating and competition (including work by myself and Roslyn Layton) and actual experiences with the practice from European Union countries.

The report's findings are extremely informative, given the extent to which the purported harms from zero-rating alarmed a large number of United States advocates in the past. Notably, this resulted in the February 2015 Open Internet Order requiring case-by-case analysis of alleged breaches of a zero-rating general conduct standard in agreements between broadband internet access service operators and end consumers.

Market power, ownership, and exclusivity all necessary for zero-rating to be a competition concern

The headline finding (albeit with the caveat that at present, there is limited evidence) is that "**there appears to be little reason to believe that zero-rating gives rise to competition concerns.**"

The main reason is that for zero-rating to be detrimental, there would need to be market power at some level (or an agreement or concerted practice that creates a network of agreements), and competitors would have to be unable to replicate the underlying arrangement. The former is less likely to be a concern in European fixed line markets, given the extensive use of access regulation to promote services competition, and in all fixed-line markets (including the US) where flat-rate usage tariffs prevail because in these cases, all traffic is effectively zero-rated. There may be more concern in mobile markets, but only to the extent that the latter effect also prevails: that is, if an internet service provider (ISP) is also the owner of the zero-rated content, which is available exclusively over the ISP's own infrastructure and only to its customers.

In practice, the report's authors find that these circumstances have hardly ever prevailed in the European case studies. And while a number of links were found between the prevalence of zero-rating and market artefacts, there were sufficient exceptions to call into question whether there are any persistent problems warranting intervention.

Zero-rating in practice in Europe

As expected, zero-rating was more likely to be observed in countries where data caps are tighter, such as Portugal and Bulgaria. However, tight data caps are not sufficient for zero-rating to prevail. There are notable exceptions, such as Sweden, where mobile plans have very high data allowances but zero-rating offers are also prevalent.

Furthermore, the content categories most likely to be zero-rated were social media, audio streaming, video streaming, and communications (e.g., text messages). Data-light applications were more likely to be zero-rated than data-intensive ones (e.g., standard-definition video rather than high-definition). In most content categories, there are more instances of zero-rating third-party content than operator-owned content. Moreover, little evidence was found of exclusivity or commercial agreements between ISPs and content providers regarding zero-rating.

Together, these observations led to the conclusion that, currently at least, there is little evidence of zero-rating leading to competitive harm.

Is net neutrality at odds with competition law?

Furthermore, the review of academic literature on zero-rating found a potential bias in focus on breaches of net neutrality principles rather than competition law concerns. If the overriding purpose of regulation is to promote competition, then it is apposite to consider the competitive effects alongside the net neutrality effects when introducing regulations concerning the use of zero-rating.

Assessing the competitive effects of any zero-rating regulation requires examination of the practice's effect on the value derived by individual subscribers when signing up for a plan. Little evidence was found in existing case law of attention being given to the share of overall costs of the zero-rated content for the providers and the benefits derived by its consumers.

As ISPs will generally have an incentive to reduce the costs of access to content that subscribers value highly to maximize the number of subscribers and hence subscriber revenue, it is not clear that the pricing policy per se can distort competition in a way that is harmful to consumers. Zero-rating content that is not highly valued is unlikely to lead to that firm assuming a dominant position – indeed, such an action will likely lead to an ISP losing rather than gaining subscribers.

A balanced approach

So competition concerns appear to come down to the potential for a firm that owns content to foreclose competitors by making access to proprietary content exclusive to the firm's networks – something that may arise with mergers of content and infrastructure firms. However, as argued elsewhere, this is more properly addressed as a potential anticompetitive harm arising from the tying of products than as a per se breach of net neutrality rules, which may discriminate but not necessarily cause long-term harm to end consumers.

The debate in the US would benefit from careful reading of this important EU research.

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